

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

09/19/2001

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

M. Cearfoss
Deputy

LC 1999-000457

FILED: _____

STATE OF ARIZONA

THEODORE S BULLOCK

v.

MARY ELLEN ARMSTRONG

CRAIG W PENROD

GILBERT CITY COURT
REMAND DESK CR-CCC

RULING

GILBERT CITY COURT

Cit. No. 51126

Charge: B. DRIVING UNDER THE INFLUENCE OF ALCOHOL
C. ALCOHOL CONCENTRATION OVER .10

DOB: 07-25-1957

DOC: 11-14-1998

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. Section 12-124(A).

This case has been under advisement since the Court heard oral argument on August 27, 2001. This Court has considered the

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

09/19/2001

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

M. Cearfoss
Deputy

LC 1999-000457

record of the proceedings from the Gilbert City Court, the exhibits and transcripts made of record, and the memoranda submitted by counsel.

The Appellant, Mary Ellen Armstrong, was arrested November 14, 1998, in the city of Gilbert, Arizona, and charged with driving while under the influence of intoxicating liquor, a class 1 misdemeanor, in violation of A.R.S. Section 28-1381(A)(1); and driving with a blood-alcohol content in excess of .10 within two hours of driving, a class 1 misdemeanor, in violation of A.R.S. Section 28-1381(A)(2). Appellant agreed to take a breath test and was administered a breath test using an Intoxilyzer 5000 machine. The results of two breath samples showed a .124 and .127 alcohol concentration. Appellant filed a Motion to Suppress the breath test results citing numerous grounds in support of her motion. The matter was scheduled for an evidentiary hearing; however, the parties agreed to vacate the hearing and submitted the case to the Court on the basis of an evidentiary hearing conducted January 20, 1999, in the case of *State of Arizona v. Paul Anthony Ahern*.¹ After reviewing all of the transcripts and evidence submitted, Judge Nicole R. Laurin, a judge of the Gilbert City Court, denied Appellant's Motion to Suppress in a detailed and well-reasoned opinion dated April 26, 1999. Thereafter, the parties' waived their rights to a jury trial and submitted the case to the Court based upon stipulated evidence. Appellant was found guilty of both charges, sentenced, and has filed a timely Notice of Appeal.

The only issue raised on appeal is whether the trial judge erred in denying Appellant's Motion to Suppress the breath test results. Appellant urged the trial judge, and now this Court, to suppress breath test results because of a change made to software on the Intoxilyzer 5000. The "EPROM" was modified in 1997 in regard to the information retained: test failures were not recorded. The heart of Appellant's contention is that the existence of test failures affects the reliability of the

¹ *State v. Paul Anthony Ahern* is now pending before this Court under Superior Court No. LC 99-00183.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

09/19/2001

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

M. Cearfoss
Deputy

LC 1999-000457

Intoxilyzer 5000 machines and the ability of defense counsel to impeach the reliability of said machines.

This Court is without the authority to reverse a trial judge's ruling on the admissibility of evidence or a motion to suppress without the finding that the trial judge clearly abused his or her discretion.² Where a trial judge's ruling is supported by substantial evidence in the record, this Court must affirm the trial judge's ruling.³ This Court must view the facts in a light which is most favorable to upholding the trial judge's ruling, and must resolve reasonable inferences against the Appellant.⁴ This Court must also defer to the trial judge's factual findings where there are conflicts within the evidence.⁵ The trial judge, as a fact finder, occupies the most advantageous position of weighing the credibility, veracity, and reliability of witnesses and documentary evidence. The trial judge found that the Intoxilyzer 5000 used in this case was approved by the Department of Health Services and that the installation of the EPROM software did not modify the device. The Court found the EPROM software has no effect on the basic functioning of the Intoxilyzer 5000.

The trial judge's finding is supported by the record. James Farrell, a laboratory consultant with the Arizona Department of Health Services, testified that the new software did not affect the accuracy or the precision of the readings from the Intoxilyzer 5000.⁶ Most importantly, Mr. Farrell testified that the EPROM software did not modify the Intoxilyzer 5000's ability to make accurate and reliable blood-alcohol readings. There was no need for additional re-certification of the Intoxilyzer 5000 because its basic functioning was not affected.⁷

² *State v. Morales*, 170 Ariz. 360, 824 P.2d 756 (App. 1991).

³ *Pharo v. Tucson City Court*, 167 Ariz. 571, 810 P.2d 569 (App. 1990).

⁴ *State v. Guerra*, 161 Ariz. 289, 778 P.2d 1185 (1989).

⁵ *State v. Plew*, 155 Ariz. 44, 745 P.2d 102 (1987).

⁶ Reporter's Transcript of January 20, 1999, at 90, 103 (from *State of Arizona v. Paul Anthony Ahern*).

⁷ *Id.* at 103-104.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

09/19/2001

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

M. Cearfoss
Deputy

LC 1999-000457

There is clearly substantial evidence in the record to support the trial judge's denial of Appellant's Motion to Suppress.

IT IS THEREFORE ORDERED affirming the judgments of guilt and sentences imposed.

IT IS FURTHER ORDERED remanding this case back to the Gilbert City Court for all future proceedings.